No. 94-374

(3)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CALVIN J. WEBER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

CALVIN J. WEBER
pro se Petitioner

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ARNOLD, MO 63010-4204
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REPLY

1. Respondent misstated petitioner's "Question Presented." The correct questions presented are listed in the Petition for Writ of Certiorari. Petitioner's security clearance was revoked for whistleblowing, and the revoked clearance was used for petitioner's removal. There was no other reason involved in either action. Because respondent surfaces false and unsustained FBI accusations, petitioner will add that the protected disclosures were entirely lawful and did not violate any provision of any Executive Order. It is a matter of Government running amok.

2. Respondent has addressed merits of petitioners case obtained from information in the MSPB file. In reply to the FBI's accusations and MSPB/respondent's misleading and allegedly concealed (certainly omitted) information, petitioner invokes rights guaranteed by the Fifth Amendment's Due

Process to defend against false, fraudulent, fictitious, unsubstantiated, and unsustained accusations. Additionally, both the Army and FBI engaged in acts which violated U.S. criminal codes. The acts were flagrant and indefensible.

3. Petitioner was employed for 19 years as a Mechanical/Aerospace Engineer with the Army's Aviation and Troop Command (ATCOM). Plaintiff worked with high tech helicopter radar and infrared countermeasures (defensive equipment to thwart anti-aircraft missiles). Prior to Desert Shield (dating back to 1988), petitioner disclosed Army aviation war readiness problems and waste of taxpayers money by the Army's restricting contracts to sole source procurement in violation of the Competition in Contracting Act of 1984. There was a finding by the DoDIG that the Army had wasted $25 Million by not competing. ATCOM is located in St. Louis, MO.

4. The Army immediately sought reprisal and attempted to remove petitioner in May 1990, for cause. Petitioner sought and obtained an investigation by the OSC. Investigations by OSC and the head of the agency (Pentagon) occurred throughout 1990 and into 1991. The OSC investigation found prohibited personnel practices and saved petitioner's employment.

5. However, in October 1990, while OSC's investigation was ongoing, petitioner was arrested, searched for weapons and contraband, handcuffed, physically and verbally abused, and then forcibly ejected from the federal workplace by armed guards and military personnel. Petitioner was carried down the hallway in handcuffs parallel to the floor, in front of peers, and temporarily incarcerated. Petitioner did not resist arrest.

6. The incident stemmed from petitioner's speaking with the news media during Desert

Shield in the fall of 1990, when petitioner disclosed that Army mismanagement had put soldiers lives in harm's way. Petitioner lawfully exercised rights under the First Amendment's Freedom of Speech. The Army acknowledged that petitioner's disclosures were accurate. Action was taken to correct the readiness problem when Legislators got involved. However, petitioner alleges there were still casualties, including fatalities, from helicopter(s) shot down during Desert Storm because of Army mismanagement. Allegedly, a national news article, written by the military, revealed the loses and played down mismanagement. Then in an alleged violation of First Amendment rights, DOD issued a post Desert Storm directive which in essence stated that equipment problems and shortcomings experienced during the gulf war was classified information, i.e., a cover-up.

7. Misdemeanor charges against petitioner for failure to comply with an officer's

directive during petitioner's forced removal was subsequently dismissed by the U.S. Attorney. The agencies violated the law, not petitioner.

8. Petitioner's forced removal received national media attention and an unsolicited response from Rep. John Conyers, Jr., Chairman of the House Committee on Legislation and National Security Subcommittee of the Committee on Government Operations. Rep. Conyers stated that he was "greatly concerned" about the treatment of petitioner and asked that the Secretary of the Army prepare a briefing as to the status of petitioner. The briefing stated the matter was under investigation by the DoDIG. The investigation apparently was dropped. The FBI's accusations however, are contradictory to findings of the National Security Subcommittee as well as some Army documents which claimed petitioner disclosed "sensitive" information; which is not a level of National Security

classification. Executive Order 12356 prohibits creating other terms to identify classified information.[1]

9. Petitioner's forced removal from the workplace violated provisions of WPA 1989 provision which prohibits a personnel action during an OSC investigation unless approved by the MSPB. There was no approval; the forced removal was done at the whim of the military with the assistance of Federal Protective Service guards. Petitioner was forced to stay away from the workplace until petitioner's security clearance could be revoked and then termination of employment (2 1/2 years later).

10. Shortly before petitioner's physical removal in October 1990, the Army's Intelligence and Counterintelligence

1. Paragraph 1.1(b) states; "Except as otherwise provided by statute, no other terms shall be used to identified classified information."

agents rummaged through petitioner's background, dating back to when petitioner graduated from high school (1960), looking for a record (reason) to revoke petitioner's security clearance. Various local law enforcement agencies (including the FBI) were contacted to see if they had a record on petitioner. GSA Protective Services also ran a criminal history check through NCIC, LEADS, MULES, and REGIS (whoever they are). Except for traffic there was no record. These searches, eight (8) in total, were conducted without Probable Cause, in violation of the Fourth Amendment.

11. Following physical removal from the workplace, petitioner was forced on a work detail involving construction projects at a nearby Army base. The reason given by the agency (Army) for the detail was that it was "prejudicial to the interest of national security," thereby denying petitioner the right to appeal or seek a transfer to a job not requiring a security

clearance. The Army's reason was false, fictitious, and fraudulent; a criminal violation of 18 U.S.C. 1001. Petitioner was forced to work at a technician level during the gulf war and more than 2 years thereafter based on improper procedure a a willful criminal act. Because the actions taken against petitioner contained the word security, false as it was, MSPB still divested itself of jurisdiction.

12. While assigned to the work detail, both FBI and Army deliberately conspired to criminally prosecute petitioner on knowing false espionage related charges in retaliation for all of petitioner's whistleblowing activities. This was a case of malicious prosecution. Conspiracy was in violation of 18 U.S.C. 372.

13. During FBI's investigation, lasting approximately 1 1/2 years, there was not one interview with petitioner granted by the FBI. This violated petitioner's

rights under the Fifth Amendment to confront the accuser(s).

14. On February 3, 1992, the Department of Justice, Security Section, notified FBI that Justice declined to prosecute petitioner. This statement is the closing paragraph of the FBI report referred to in respondent's response (A.F. Tab 1b, at 2.).

15. On February 28, 1992, the "FBI report" was forwarded by a personal letter addressed to petitioner's supervisor; the same Army Colonel who had petitioner ejected from the workplace in Oct 1990. The FBI letter stated that "the enclosed document is provided for use in administrative/legal proceedings involving above captioned subject <petitioner>." This letter violated petitioner's rights under Amendment Five (Due Process) and (Double Jeopardy).

16. On March 16, 1992 formal Army action was taken to revoke petitioner's security clearance based on the FBI report. An

internal Army Pentagon memorandum stated that on April 3, 1992, Justice had notified the Army that Justice declined to prosecute petitioner. Both the FBI and Army were given the notice. There is no documentation showing where the Pentagon notified ATCOM of the Justice decision.

17. The Army's Personnel Department in a memorandum stated that petitioner's security clearance was revoked for one and only one reason. That reason was unauthorized disclosure of classified information of classified information during Desert Shield Campaign. Petitioner's security clearance was revoked on February 22, 1993, not September 30, 1992 as indicated in response.

18. Between the date of the Letter of Intent (July 7, 1992) and the revocation (February 22, 1993), petitioner responded five (5) times requesting proof of the charges made against petitioner. Contrary to respondent's statement that petitioner

did not address the primary security concern, petitioner most certainly did respond. One problem was that both the Army and FBI withheld files from petitioner in an effort to conceal facts. In the absence of files, petitioner asked questions for the accuser(s) to answer. The accusers refused to answer questions.

19. Respondent has allegedly concealed (certainly omitted) the fact that the same FBI accusations used to revoke petitioner's security clearance were first used by the FBI and Army in an unsuccessful attempt to prosecute petitioner on espionage related charges under 18 U.S.C. 798. The FBI report referenced by respondent is a two (2) page unsigned document written on FBI stationary. The report first lists references to newspaper articles, then states that petitioner's disclosures could not be traced to any classified documents, and concludes with the statement that Justice declined prosecution in this matter.

20. The FBI's determination that petitioner disclosed classified aircraft vulnerability information is a false, fraudulant, fictitious and unsustained determination. The matter involved disclosing information gathered from none other than open sources. According to the FBI's determination, the exterior view of a helicopter was SECRET information. Regarding the reference that FBI determined petitioner disclosed "location of these aircraft," petitioner only disclosed what was pictured in the newspapers and on TV. Saudia Arabia was the only location disclosed. Certainly nothing was classified about that location, the entire world knew about it. If pictures of helicopters were classified, then every newspaper, magazine, and TV newscast which showed deployed Army helicopters had disclosed classified information. The FBI's findings are flagrant, stupid, and indefensible and in violation of 5 U.S.C. 1001; but they worked.

21. Respondant also allegedly concealed (certainly omitted) the fact that FBI accused petitioner of violating an ATCOM in-house guidance statement which restricted what could or could not be discussed openly during an impending war. First, the guidance statement was not an Executive Order. Second, Executive Order 12356 prohibits the issuance of such a document for classification. Third, the guidance statement provided only guidance. Fourth, the guidance statement was provided to petitioner after-the-fact when sent to petitioner's residence by certified mail (Ex Post Facto). Fifth, the guidance statement could be used as a tool to abridge rights guaranteed by the First Amendment.

22. The Department of Justice made the decision not to PROSECUTE without contacting petitioner. Additionally, petitioner presumes Justice made the decision not knowing the charges were Ex Post Facto,

based on the fact the certified mail receipt is missing from the files; another act of concealment.

23. Regarding the "file" referenced in the Letter of Intent to Revoke petitioner's security clearance, petitioner made the request to obtain the file under FOI. However, information was withheld from petitioner. The Army file has large amounts highlighted in black, while the FBI has withheld their entire files from petitioner. Petitioner has made three (3) requests to the Army to obtain the withheld information and three (3) requests to the FBI to obtain the files. The Army has refused to respond while the FBI states that the files need to undergo declassification and that due to the large amount of requests, no guarantee could be provided as to when the FBI will act on petitioner's request. Petitioner does not even know details of reasons for security clearance revocation, a violation of petitioner's rights under Due Process.

The only information released by the FBI is that there are 2 files with a total of 168 pages. That was the extent of the FBI's release of information since petitioner's first FOI request made in September 1992.

24. Regarding respondant's statement that agencies are not free to rid themselves of federal employees for most any reason because of procedural safeguards, petitioner's case proves the statement wrong. Federal employees are continuously urged to make disclosures of waste, mismanagement and safety, which is exactly what petitioner did, and there are no procedural safeguards when it comes to revoking security clearances and then termination for loss of clearance. The MSPB hearing for petitioner's appeal of termination amounted to a flouting of due process, as due process was intended by the framers of the Constitution and provided to everyone else. Just being provided with

a piece of paper and a chance to respond is not due process of law.

25. After 6 years of whistleblower harassment, 1 OSC investigation which found the agency engaged in a prohibited personnel practice (600 pages of findings), 8 subsequent denials by OSC, 11 MSPB whistleblower appeals, 8 Petitions For Review with the Full MSPB, 9 Petitions For Review with the Court of Appeals for the Federal Circuit spanning 5 years of litigation, federal managers have found that Egan provided the tool for allowing arbitrary, capricious, and even criminal acts that were necessary to get rid of petitioner. There are no safeguards for bad faith and zealous actions.

26. If false, fictitious, fraudulent, and unsustained information used as gospel truth by MSPB weren't bad enough, the administrative judge allowed the agency to commit perjury during petitioner's

dismissal hearing. This was a similiar pattern with OSC who also allowed the agency to commit perjury. The OSC decided to overlook perjury instead of taking the matter before the Attorney General as a criminal act as is required by WPA of 1989.

27. During the hearing petitioner was not allowed to say anything other than did the agency provide a piece of paper and did the agency give petitioner a chance to respond. That is a meaningless exercise when there is bad faith, zealous actions, abuse and predispositions involved. Such an imbalance has stood due process on its head in petitioner's case. The dissenting Justices in Egan hit the nail on the head when they predicted occurances of false allegations, lack of rational nexus to national security concerns, and deprival of meaningful hearing.

28. Petitioner has researched and seen where a security clearance has been revoked

because of the person's driving record or financial irresponsibility. The Army's Personnel Security Program (AR 380-67) states in pertinent part that "The criteria for determining eligibility for a clearance ....shall include but not be limited to... Acts of omission or commission that indicate poor judgement, unreliability, or untrustworthiness." Such lose criteria leaves the field wide open for abuse.

29. The Kent v. GSA case referenced by respondent is irrevelant to petitioner's case. The charges in Kent are not false, fraudulent, fictitious and unsustained.

30. And lastly, respondent states that "The Army complied with regulation in issuing a Letter of Intent." Nothing is mentioned about "revocation." The facts are that procedures of AR 380-67 were not followed correctly, but then again there was no meaningful review provided to petitioner under CSRA.

CONCLUSION

Petitioner's disclosures were protected pursuant to 5 U.S.C. 2302(b)(8)(A)(ii). Petitioner's disclosures were lawful pursuant to 5 U.S.C. 2302(b)(8)(A). The Army and FBI acted in an arbitrary and capricious manner, and in contrary to law and violated U.S. criminal codes. The Army knowingly used Egan for protection. MSPB choose to parrot Army/FBI information stating that could go no further because of Egan. Then, MSPB and respondent have withheld information showing charges were unsustained. The principles of Egan and how they can be used for arbitrary, capricious and even criminal acts by an agency should be re-examined. Request that the Petition for Writ of Certiorari proceed and not be denied in light of the foregoing.

Respectfully submitted.

Calvin J. Weber
pro se petitioner

October 1994